A **BUTIRAN NYATA SDN BHD v. TETUAN NASIRA AZIZ & CO**

HIGH COURT MALAYA, SHAH ALAM
WAN AHMAD FARID SALLEH JC
[CIVIL SUIT NO: 22NCVC-427-09-2014]
13 APRIL 2016

B

LEGAL PROFESSION: *Solicitors – Stakeholders – Solicitor acted for vendor in sale and purchase agreements for sale of properties – Solicitor discharged itself from further acting for vendor before completion date – Solicitor negligent in releasing monies to vendor – Whether solicitor a stakeholder under sale and purchase agreements – Whether solicitor in breach of stakeholding duties – Whether solicitor a trustee – Whether sum held by solicitor stakeholding money*

C

The plaintiff entered into sale and purchase agreements ('the SPAs') with AINB Tech Sdn Bhd ('AINB') to purchase ten units of office shop lots ('the properties') for a total consideration of RM6,000,000. Before the completion date, the firm of solicitors ('the defendant') acting for AINB, discharged itself from further acting for AINB. The plaintiff alleged that the defendant was in breach of its stakeholder duty. According to the plaintiff, it had paid the defendant total sum of RM3,070,791.62 and the latter was negligent in releasing the said sum to AINB. The defendant denied that it was in breach of its duty as the stakeholder because s. 3.05(a)(i) and 3.05(a)(ii) of the SPAs provide that the deposit was to be paid to AINB directly and even if it was made through the defendant, it did not provide for the defendant to hold the money as a stakeholder. Therefore, the plaintiff, by their own conduct was estopped from alleging otherwise. The issues that arose for the court's determination were: (i) whether the defendant was a stakeholder of the monies received and held under s. 3.05(a)(i), (ii) and (iii) of the SPAs; (ii) whether there was a breach on the part of the defendant so as to entitle the plaintiff for the refund of the monies paid for; and (iii) whether the plaintiff's claim was barred under the Limitation Act 1953.

D

E

F

G **Held (ordering accordingly):**

(1) Although the money was paid by the plaintiff to the defendant, it was not meant to be kept as a stakeholder by the defendant. In fact, s. 3.05(a)(i) did not even mention the word 'stakeholder'. Section 3.05(a)(i) would have provided so had it been the intention of the parties. From the wordings of s. 3.05(a)(i), it was apparent that the RM600,000 was not meant to be a redemption sum or for any purpose other than the deposit. The sum of RM600,000 paid by the defendant to AINB was pursuant to s. 3.05(a)(i). The defendant would have been in breach of that section if it failed to effect payment to AINB. (paras 23 & 25)

H

I

(2) Section 3.05(a)(ii) of the SPAs did not mention in any way that the sum of RM1,200,000 was meant to be part of the redemption money. In fact, the amount was clearly meant for AINB as the vendor which duly

acknowledged receipt of the same. The sum of RM1,020,000 was not received by the defendant in its capacity as stakeholder in that it was at liberty to eventually disburse the same to AINB. By forwarding the sum to AINB, the defendant was actually giving effect to s. 3.05(a)(ii) of the SPAs. (paras 26 & 28)

(3) The role of a solicitor as a stakeholder goes beyond any contractual provision in any SPA. It is more than a contractual obligation. It is trite that a stakeholder is a trustee and that such funds are not held in contractual or *quasi* contractual capacity. For the defendant to have avoided his obligation as a stakeholder, a clear and unequivocal language must be used in the exchange of letters. There was no evidence or correspondence to the effect that s. 3.05(a)(iii) had been expressly varied by the parties so as to discharge the defendant from his role as a stakeholder. The defendant was a stakeholder and hence a trustee in respect of the money received and held under s. 3.05(a)(iii) of the SPAs. It was to hold the sum of RM528,767.12 in trust and this trust could only be discharged by clear variation made expressly in the exchange of letters between the defendant and the solicitors acting for the plaintiff. There was no evidence of such letters and therefore, the trust remained. (paras 32, 33 & 36)

(4) The defendant received the last cheque of RM178,767.12 which was post-dated on 7 November 2008. Therefore, the plaintiff was not caught by the Limitation Act 1953 since time started to run from 7 November 2008 which was the date of the post-dated cheque. In any case, the defendant must have forwarded the same, upon clearance of the same to AINB after 7 November 2008. The defendant was ordered to refund the sum of RM528,7676.12 to the plaintiff. (paras 45, 46 & 50)

Case(s) referred to:

AmGeneral Insurance Bhd v. Iskandar Mohd Nuli [2016] 2 CLJ 1 CA ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Datuk M Kayveas & Anor v. Bar Council [2013] 7 CLJ 533 FC ***(refd)***

Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(refd)***

Jambatan Merah Sdn Bhd (In Liquidation) v. Public Bank Bhd [2016] 1 CLJ 811 HC ***(refd)***

Kekal Baru Sdn Bhd v. Southwest Minerals (M) Sdn Bhd [2015] 1 LNS 715 CA ***(refd)***

Lai Kee Peng v. Tay Hup Lian [2016] 4 CLJ 1 FC ***(refd)***

Selvaratnam Vellupillai v. Dr Jayabalan Karrupiah [2009] 1 CLJ 872 FC ***(refd)***

Urban Delta Sdn Bhd v. Toh Ah Noi [2014] 7 CLJ 575 HC ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6(1)

For the plaintiff - D Paramalingam; M/s Krish Maniam & Co
For the defendant - Leong Wai Hong & Syafinaz Vani; M/s Skrine

Reported by Najib Tamby

A

JUDGMENT

Wan Ahmad Farid Wan Salleh JC:

Introduction

B **[1]** This is yet another case that raises the question of the scope, role, duty and responsibility of a conveyancing solicitor as a stakeholder: the importance of which cannot be underestimated. It is trite that once a conveyancing solicitor accepts this role, his duty and responsibility must be carried out with the precision of the proverbial surgeon's knife. As we can see in the course of this judgment, there is no margin for error, no matter how C minute, for this could lead to disastrous result.

[2] The dispute in the instant case revolves on ten separate but similar sale and purchase agreements ("SPAs") for the purchase of ten units of office shop lots known as Merchant Square @ Tropicana situated on a land with the master title known as PN 15853 Lot 950 Bandar Damansara, Daerah D Petaling, Negeri Selangor (hereinafter collectively referred to as "the said properties").

[3] The beneficial owner of the said properties was one AINB Tech Sdn Bhd ("AINB Tech"). At the relevant time, separate strata titles in respect of the said properties have yet to be issued by the relevant authority. E

[4] The said properties were assigned by AINB Tech to Affin Bank Berhad ("Affin Bank") as a security for a loan extended by Affin Bank to AINB Tech pursuant to facility agreement, deed of assignment and power of attorney all dated 20 July 2007.

F

The Facts

[5] The factual narrative of the case can be stated as follows. On or about 7 May 2008, the plaintiff had entered into the SPAs between AINB Tech of the one part as the vendor and the plaintiff of the other as the purchaser, for the purchase of the said properties for a consideration of RM600,000 per G unit. The total consideration of the purchase of the said properties was therefore RM6,000,000.

[6] The defendant, which is a firm of solicitors, had acted for AINB Tech from April 2008 until 24 August 2009 when it had discharged itself due to H circumstances, in it's own words, "beyond our control". At the time of the defendant's discharge from acting for AINB Tech, the SPAs were yet to be completed and perfected. The reasons for the said discharge, in so far as they are relevant, will be explained in the later part of this judgment.

[7] Section 3.08 of the SPAs provides that at the request of the plaintiff, I AINB Tech had agreed to allow the plaintiff to have an early vacant possession of the said properties free from rental provided that the plaintiff were to pay a higher deposit of 30% of the total purchase price which amounted to RM1,800,000 which the plaintiff did, leaving a remaining

balance of RM4,200,000. Section 3.06 of the SPAs, in so far as it is relevant, provides that the completion period of the same shall be three months from the date of the SPAs which was on 7 August 2008 ("the date of completion").

[8] Section 3.05(a)(i) of the SPAs provides that upon execution of the same, the plaintiff shall pay RM600,000 to AINB Tech (The Second Schedule Section 1(A)) as deposit. Section 3.05(a)(ii) of the same provides that the plaintiff shall pay to AINB Tech a payment of RM1,200,000 as part payment towards the purchase price (The Second Schedule Section 1(B)). All payments were duly made by the plaintiff which payments were acknowledged by AINB Tech.

[9] The most critical provision in the SPAs in my considered opinion, can be seen in s 3.05(a)(iii). The said sub-section is reproduced here *in toto*:

> (iii) The Purchaser shall pay to the Vendor's Solicitors as Stakeholders the Balance Purchase Price of stated in Section III of the Second Schedule on or before the expiry of the Completion Period (hereinafter referred to as "the Completion Date") Provided Always that the Vendor shall in any event grant to the Purchaser an extension of time of ONE (1) MONTH from the Completion Date (the last day of which shall hereinafter be referred to as "the Extended Completion Date") to enable the Purchaser to pay the Balance Purchase Price subject to the Purchaser paying to the Vendor interest on any monies outstanding at the rate of Ten per centum (10%) per annum (hereinafter referred to as "the Interest") calculated on a daily basis from the Completion Date to the date of actual payment thereof. For the avoidance of doubt, any sum paid towards redemption or deposited with the Vendor's solicitors though not released to the Vendor is considered paid and shall be excluded for the purpose of calculation of interests.

[10] I say that s 3.05(a)(iii) of the SPAs is critical for the reason that this is the first time the word "stakeholders" appears in the same. The long and short of it is this. The first two tranches of payments under s 3.05(a)(i) (deposit and part payment) and s 3.05(a)(ii) (part payment) were supposed to be made directly by the plaintiff to AINB Tech. There was no mention of the words "vendor's solicitors" in the two sub-sections (i) and (ii). The defendant's role as stakeholders under the SPAs only comes into play under s 3.05(a)(iii) in respect of the balance of the purchase price.

[11] Apparently it later emerged in evidence at the trial that, by consent of the plaintiff and AINB Tech, the date of completion was extended on many occasions since the plaintiff could not pay the remaining balance of the purchase price on or before the date of completion. On each occasion of the extension given by AINB Tech to the plaintiff, the plaintiff had paid either part of the balance of the purchase price or the interest of the late payments thereto either directly to (i) AINB Tech or (ii) to the latter's escrow account with Affin Bank ("escrow account"). On all those occasions, despite the clear

and unequivocal provision of s 3.05(a)(iii) of the SPAs, the payments (in respect of the balance of the purchase price or interest of late payments) were made directly by the plaintiff either to AINB Tech or to the escrow account.

[12] However, as stated earlier, before the completion date, the defendant had discharged themselves from further acting on behalf of AINB Tech and another firm of solicitors by the name of Messrs Firyz, Jaffril, Aidil & Zarina was appointed by AINB Tech to take over the conduct of the matter. That of course is another story. In the circumstances, if at all there is any liability on the part of the defendant, the cut-off point would be on or before 24 August 2009, ie, the date of the letter from the defendant to Messrs Krish Maniam, the solicitor's acting for the plaintiff informing the latter of the defendant's discharge.

The Plaintiff's Case

[13] The plaintiff in their statement of claim had alleged that they had paid the defendant a total sum of RM3,070,791.62 as at 1 April 2009 of which RM117,698.62 was in the form of interest for the delay in the payment of the balance of the purchase price. The case against the defendant is therefore for the alleged breach of the stakeholder's duty in their capacity as the solicitors for AINB Tech.

[14] In para. 11 of the statement of claim, the plaintiff alleged that, contrary to the duty of the defendant as the stakeholder, the defendant was negligent in releasing the said sum of RM3,070,791.62 to AINB Tech. This has been confirmed by SP1, Sharizal Hisham bin Abdul Halim who is the sole witness on behalf of the plaintiff. Unfortunately, there was no documentary evidence to support this sum of RM3,070,791.62 allegedly paid by the plaintiff to the defendant.

[15] After the discharge of the defendant from having conduct of the matter, the plaintiff did make further payments to Messrs Firyz, Jaffril, Aidil & Zarina in respect of the balance of the purchase price but that was another issue not for the determination of this court since it did not concern the defendant in any way.

[16] There has been a dispute in respect of the total amount of money actually paid to the defendant's account by the plaintiff. This will be addressed now.

The Defendant's Case

[17] The defendant disputed the actual amount paid to the defendant by the plaintiff which according to the defendant was not RM3,070,791.62 as alleged, but was only for RM2,148,767.12. In his witness statement, SD2, Mohd Noh bin Nasira, who is one of the partners of the defendant's firm testified that the total sum of RM2,148,767.12 was as follows:

No.	Payment Mode	Date	Payee	Amount	Payment Details
1.	RHB Bank cheque No. 722733	29.4.2008	Defendant	RM600,000.00	Deposit sum as per Schedule 1A
2.	CIMB cheque No. 803399	2.5.2008	Defendant	RM1,020,000.00	Partial sum as per Schedule 1B
3.	PBB cheque No. 140818	31.10.2008	Defendant	RM350,000.00	Balance of the purchase price/late payment interest
4.	CIMB cheque No. 947270	7.11.2008	Defendant	RM178,767.12	Balance of the purchase price/late payment interest
	Total			RM2,148,767.12	

The figures referred to by the defendant hereinbefore was included in the common bundle of documents which was never disputed by the plaintiff during cross-examination.

[18] In the circumstances, and in the absence of any documentary evidence to the contrary, my finding of fact is that, the payment received by the defendant from the plaintiff, in the defendant's capacity as AINB Tech's solicitors was only RM2,148,767.12 as per the details aforesaid.

[19] The defendant denied that it was in breach of its duty as the stakeholder. In fact, the gist of its defence in the amended statement of defence can be summarised thus:

(a) In respect of the deposit, the defendant pleaded that ss 3.05(a)(i) and 3.05(a)(ii) of the SPAs provide that the deposit was to be paid to AINB Tech directly and even if it was made through the defendant, it did not provide for the defendant to hold the money as a stakeholder.

(b) In respect of the balance of the purchase price, the provision of s 3.05(a)(iii) of the SPAs that the defendant was to hold the balance of the purchase price as stakeholder had been varied by agreement between the plaintiff and AINB Tech in that the balance of the purchase price will be paid to AINB or to its escrow account with Affin Bank and not to the defendant as the stakeholder. This, according to the defendant, was in consideration of AINB Tech granting numerous extensions of time at the request of the plaintiff.

(c) Since the SPAs, in particular s 3.05(a)(iii) thereof was invariably varied by consent of the parties, the defendant relied on the principle of estoppel in that the plaintiff, by their own conduct, is estopped from alleging otherwise.

(d) Since the execution of the SPAs and until the defendant's discharge from having conduct of the matter on 24 August 2009, the plaintiff had yet to settle the balance of the purchase price resulting the defendant could not have possibly redeemed the said properties from Affin Bank.

(e) The defendant denied that they owed any duty of care or even fiduciary duty to the plaintiff since at all material times, the plaintiff was represented by their own solicitors. If at all there was any duty owed by the defendant, it was to AINB Tech and not to the plaintiff.

(f) Finally, the defendant relied on s. 6(1) of the Limitation Act 1953, in that the plaintiff's cause of action did not accrue within six years before the commencement of this action.

The Issues

[20] Against this background, I come to the issues in the instant case. Counsel for the defendant in his written submission aptly summarised the issues to be decided by this court as follows:

(a) Whether the defendant was a stakeholder of the monies that had been paid by the plaintiff to them as solicitors for AINB Tech under the SPAs; and

(b) Whether the plaintiff's claim is barred under the Limitation Act.

[21] However, issue (a) can be amplified further in the following manner:

(i) whether the defendant was the stakeholder of the monies received and held under s 3.05(a)(i) of the SPAs.

(ii) whether the defendant was the stakeholder of the monies received and held under s 3.05(a) (ii) of the SPAs.

(iii) whether the defendant was the stakeholder of the monies received and held under s 3.05(a)(iii) of the SPAs.

(iv) further, if the answers are in the positive, whether there was any such breach on the part of the defendant so as to entitle the plaintiff for the refund of the monies paid for.

[22] To answer the sub-issues raised in (i) to (iv) aforesaid, reference has to be made to the terms and conditions of the SPAs. In *Lai Kee Peng v. Tay Hup Lian* [2016] 4 CLJ 1; [2016] MLJU 1. Abu Samah Nordin FCJ, in delivering the decision of the Federal Court, reiterated the proposition of law that:

> ... the dispute as to who is entitled to the money held by the solicitor as stakeholder ultimately depends on the terms under which the money is held and the due performance by the parties of their respective obligations under the SPA.

Whether Defendant Was Stakeholder For Money Received Under s 3.05(a)(i)

[23] Pursuant to s 3.05(a)(i) of the SPAs, the plaintiff had made payment of RM600,000 to the defendant *vide* RHB Cheque No. 722733 dated 29 April 2008. Section 3.05(a)(i) of the SPAs provides as follows:

> (i) The Purchaser shall upon execution of this Agreement pay to the Vendor the Deposit Sum as stated in Section 1A of the Second Schedule (the receipt of which the Vendor hereby acknowledges) as deposit and part payment towards the Purchase Price.

The operative words in the section are that the purchaser (plaintiff) shall pay to the vendor (AINB Tech) that sum of RM600,000 (being 10% of the total consideration of the said properties) as deposit and part payment. Although the money was paid by the plaintiff to the defendant, which the defendant readily admitted, it was not meant to be kept as a stakeholder by the defendant. In fact, s 3.05(a)(i) did not even mention the word "stakeholder". Section 3.05(a)(i) would have provided so had it been the intention of the parties.

[24] The court's duty under the circumstances would be to give effect to the clear intention of the parties. Vernon Ong JCA in delivering the judgment of the Court of Appeal in *Kekal Baru Sdn Bhd v. Southwest Minerals (M) Sdn Bhd* [2015] 1 LNS 715; [2016] 1 MLJ 292, said:

> To put the objective approach in another way, in interpreting a private contract of a commercial nature, the court would prefer a commercially sensible construction; whereby the words are interpreted in the way in which a reasonable commercial person would construe them. In other words, the court will give effect to a commercial construction that is more likely to give effect to the intention of the parties (see *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464; [2011] 9 CLJ 257 (FC); and *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749 (HL)).

[25] It is apparent from the wordings of s 3.05(a)(i) that the RM600,000 was not meant to be part of the redemption sum or any other purpose other than the deposit. It is therefore my finding that the sum of RM600,000 paid by the defendant to AINB Tech was pursuant to s 3.05(a)(i). In fact, the defendant would have been in breach of that section if it failed to effect payment to AINB Tech.

Whether The Defendant Was The Stakeholder Of The Monies Received And Held Under s 3.05(a) (ii)

[26] Section 3.05(a)(ii) of the SPAs provides thus:

> The purchaser shall upon execution of this Agreement pay to the Vendor the partial sum as stated in Section 1B of the Second Schedule (the receipt whereof the Vendor hereby acknowledges) as part payment towards the Purchase Price.

Section 1B of the Second Schedule stipulates that the part payment shall be RM1,200,000 (for the ten units of the said properties). Again it is very clear that s 3(a)(ii) of the SPAs did not mention in any way that the sum RM1,200,000 was meant to be part of the redemption money. In fact, the amount was clearly meant for AINB Tech as the vendor which duly acknowledged receipt of the same.

[27] Of the RM1,200,000 mentioned in Section 1B of the Second Schedule, the payment made was only RM1,020,000 which was short of RM180,000. It transpired that the said RM180,000 was paid earlier to AINB Tech's agent Reapfield Properties (Hartamas) Sdn Bhd. This can be explained by the letter dated 15 April 2008 from Messrs Peter Chen & Co, the then solicitor's firm representing the plaintiff, to the defendant. In that letter, Messrs Peter Chen & Co confirmed that the plaintiff had paid an earnest deposit of RM180,000 pursuant to an agreement to purchase. Since the payment of RM180,000 was made even before the formal execution of the SPAs, there is no rhyme or reason to make the defendant liable on monies held and received before it's appointment as the solicitors.

[28] In the circumstances, it is therefore my finding that the sum of RM1,020,000 was not received by the defendant in its capacity as stakeholder in that it was at liberty to eventually disburse the same to AINB Tech. In fact, in my considered opinion, the defendant, by forwarding the sum to AINB Tech, was giving effect to s 3.05(a)(ii) of the SPAs.

(iii) Whether The Defendant Was A Stakeholder Of The Monies Received And Held Under s 3.05(a)(iii) Of The SPAs

[29] That left us with the balance of RM528,767.12 being the monies received by the defendant on 31 October 2008 (RM350,000) and 7 November 2008 (RM178,767.12) respectively. Counsel for the defendant submitted that the money was released to AINB Tech as agreed by the plaintiff in consideration of the AINB Tech granting numerous extensions of time at the request of the plaintiff. Counsel then argued that the plaintiff is therefore estopped by conduct and subsequent agreement from alleging that the defendant is a stakeholder.

[30] The first question that has to be addressed at this stage is whether the SPAs allow for any variation of the terms and conditions thereto. Section 6.13(i) of the SPAs provides that it is "expressly declared that no variations of the SPAs shall be effective unless made by the parties thereto in writing". The provision in my considered opinion, is wide enough so as to allow any variation or amendment by an exchange of letters and shall be effective

without the necessity of having to enter into any formal or supplemental agreement; see *Jambatan Merah Sdn Bhd (In Liquidation) v. Public Bank Bhd* [2016] 1 CLJ 811.

[31] Although the exchange of letters were done through the respective solicitors, it is not a constraint in law, since it is a general rule that the knowledge of a solicitor is the knowledge of the client. In *Doshi v. Yeoh Tiong Lay* [1974] 1 LNS 30; [1975] 1 MLJ 85. Gill CJ (Malaya) in delivering the decision of the Federal Court said:

> Now the general rule is that the knowledge of a solicitor is the knowledge of the client, so that it is not open to the client to say that the solicitor did not disclose the true facts to him.

[32] Based on the aforesaid authorities, it is my finding that the SPAs can be varied by the exchange of letters. However, counsel for the defendant conceded that in the exchange of letters, it was not expressly mentioned that the stakeholder term in s 3.05(a)(iii) was varied. In my considered opinion, the role of a solicitor as a stakeholder goes beyond any contractual provision in any SPA. It is more than a contractual obligation. In fact it is trite that a stakeholder is a trustee and that such funds are not held in contractual or *quasi* contractual capacity; see *Urban Delta Sdn Bhd v. Toh Ah Noi* [2014] 7 CLJ 575; [2014] 5 MLRH 564 and *Datuk M Kayveas & Anor v. Bar Council* [2013] 7 CLJ 533; [2013] 5 MLRA 437. In *Selvaratnam Vellupillai v. Dr Jayabalan Karrupiah* [2009] 1 CLJ 872; [2008] 3 MLRA 25 FC delivering the majority judgment of the Federal Court Zaki Azmi CJ said that:

> Although the appellant contended that until he received the full redemption sum he was not deemed a stakeholder that could not be so. Once a solicitor holds money in trust for his client or any other party for a purpose it remains trust money even if the amount is insufficient to be utilised for that purpose.

[33] In the circumstances, for the defendant to have avoided his obligation as a stakeholder a clear and unequivocal language must be used in the exchange of letters. I cannot find any evidence or correspondences to the effect that s 3.05(a)(iii) has been expressly varied by the parties so as to discharge the defendant from his role as a stakeholder. In fact when asked during cross examination SD2 replied in the affirmative "no".

> 61Q: Encik Noh, my question is, was there any written confirmation, yes or no? If you don't have[,] you don't have [or] if you have[,] you have. Was there any written confirmation from the Plaintiff that the terms have been varied? Yes or no?
>
> A: No.

For the principle of estoppel to operate, it requires clear, unequivocal and unambiguous representation that the plaintiff was abandoning its rights to make any claims against the defendant had the defendant released the monies paid under s 3.05(a)(iii) to AINB Tech. From the evidence before me, there

was no such representation in any of the letters relied on by the defendant and there was no mention that the plaintiff was abandoning the operation of s 3.05(a)(iii) of the SPAs. In *AmGeneral Insurance Bhd v. Iskandar Mohd Nuli* [2016] 2 CLJ 1; [2016] 2 MLRA 94, the Court of Appeal referred to the remarks made by the editors in *Mac Gillvray on Insurance Law* (10th edn., Sweet and Maxwell 2003) for the proposition that an estoppel requires:

(i) a clear representation by word or conduct of a present fact;

(ii) made to someone who is expected to act on it; and

(ii) who does so, to his 'detriment'.

Reverting now to the instant case, I must emphasise that only if the relevant s 3.05(a)(iii) was expressly varied in the exchange of letters would the principle of estoppel, as vigorously urged by the counsel for the defendant, come into play.

[34] The role of the stakeholder as a trustee is so sacred that I cannot, by any stretch of legal imagination, allow it to be avoided without any express variation made to the SPAs. Counsel for the defendant pointed to me in the oft-cited case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 1 MLRA 738 where the Federal Court affirmed that the doctrine of estoppel was a flexible principle of wide utility to meet the ends of justice in the circumstances of each case. Delivering the decision of the apex court, Gopal Sri Ram JCA (as he then was), stated that estoppel:

> ... may be applied to prevent a litigant from asserting that there was no valid or binding contract between him and his opponent ... It may operate to bind parties as to the meaning or legal effect of a document or a clause which they have settled upon or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning.

[35] Let it be known that at no time did the plaintiff in the instant case represent or encourage the defendant to believe that it had abandoned the operation of s 3.05(a)(iii).

[36] In the circumstances, to answer the question posed in this sub-head, it is therefore my ruling that the defendant was a stakeholder and hence a trustee in respect of money received and held under s 3.05(a)(iii) of the SPAs. It was to hold the sum of RM528,767.12 in trust and this trust can only be discharged by clear variation made expressly in the exchange of letters between the defendant and the solicitors acting for plaintiff. It is my finding of fact that there was no evidence of such letters and the trust therefore remains. It does not matter for whom the defendant is acting, on the authority of *Selvaratnam Vellupillai* (*supra*) "it remains trust money even if the amount is insufficient to be utilised for that purpose".

[37] Counsel for the defendant argued that although the duty of care was pleaded by the plaintiff, the breach of the same was not. With respect, I cannot accede to this contention. The breach of duty of care was clearly pleaded in para. 14 of the statement of claim:

> 14. Dalam memungkiri kewajipannya di bawah Perjanjian-Perjanjian Jual Beli tersebut dan juga secara cuai, Defendan telah gagal untuk melaksanakan tanggungjawab mereka sebagai pemegang wang taruhan apabila melepaskan jumlah harga belian Unit-Unit tersebut kepada AINB Tech tanpa memastikan bahawa Unit-Unit tersebut telah dipindah milik dengan sempurnanya kepada Plaintif.

[38] While I agree with the authorities highlighted by counsel for the defendant on the proposition that parties are bound by their pleadings, I must say that the plaintiff had in no uncertain terms pleaded that the defendant had, by way of negligence, failed to perform its obligation as a stakeholder in releasing the monies to AINB Tech. It cannot be anything clearer than that.

(iv) If The Answer Is In The Positive, Whether There Was Any Such Breach On The Part Of The Defendant So As To Entitle The Plaintiff For The Refund Of The Monies Paid For

[39] To summarise, my findings on the monies received by the defendant would be as follows:

(a) The sum received for RM600,000 on 29 April 2008 by the defendant was for the purpose of deposit as per s 3.05(a)(i) and therefore was not received in its capacity as the stakeholder;

(b) The sum received for RM1,020,000 on 2 May 2008 by the defendant was for the purpose of partial sum under s 3.05(a)(ii) and therefore was not received in its capacity as the stakeholder;

(c) The sum received for RM350,000 on 31 October 2008 by the defendant was for the purpose of the balance of the purchase price/late payment of interest was under s 3.05(a)(iii) and therefore was received by the defendant in its capacity as the stakeholder and hence the trustee.

(d) The sum received for RM178,767.12 on 7 November 2008 by the defendant was also for the purpose of the balance of the purchase price/ late payment of interest under s 3.05(a)(iii) and therefore was received by the defendant in its capacity as the stakeholder and hence the trustee.

[40] I would like to pause at this point. Over and above the escrow account with the Affin Bank, the AINB Tech also operated another account known as the sinking fund. According to SD2, AINB Tech had secured a few government contracts and Affin Bank had provided contract financing facilities to the former. Proceeds from the payments by the government pursuant to those contracts would be channelled to this sinking fund. At one time, according to SD2, the sinking fund belonging to AINB Tech was in access of RM500,000.

[41] There were occasions where the plaintiff made direct payments to Affin Bank as a consideration for AINB Tech giving them the extension of times to extend the date of completion. Those were not made through the defendant. In his evidence, SD2 testified he was given the assurance by the representative of AINB Tech that there was sufficient reserve in the sinking fund in the name of the latter to pay the redemption sum and the balance of the purchase price.

[42] Unfortunately, later it became apparent to SD2 that the redemption is higher than the purchase price. To make it even worse, when SD2 contacted Affin Bank, they confirmed that AINB Tech had withdrawn the sinking fund, which made it almost impossible for the redemption sum to be paid to Affin Bank without AINB Tech having to top it up. It was for this reason that the defendant had discharged itself for further acting on behalf of AINB Tech.

[43] The defendant should have kept in trust and returned the same when it became apparent that the money received was not sufficient to redeem the said properties from Affin Bank. Under no circumstances should the defendant release the money to AINB Tech since it was supposed to be kept in trust for the purpose of the redemption of whatever amount outstanding with Affin Bank in order to facilitate the transfer of the said properties to the plaintiff free from any encumbrances. It is therefore my judgment that the defendant was in breach of its role, duty and responsibility as a stakeholder in releasing the total sum of RM528,767.12 (of (c) and (d)) to AINB Tech. The plaintiff is therefore entitled to the refund of the said sum and I so rule.

Whether The Plaintiff's Claim Is Barred By Statute

[44] By his own admission in his witness statement, SD2 on behalf of the defendant testified that the defendant received the last cheque of RM178,767.12 which was post-dated on 7 November 2008. In answer to question 62 of his witness statement, SD2 testified that his firm received the cheque CIMB No. 947270 which was made in favour of the defendant's firm from the plaintiff's solicitors Krish Maniam *vide* it's letter dated 31 October 2008.

[45] This writ was commenced on 3 September 2014 which is well within the six year period prescribed by s. 6(1) of the Limitation Act.

[46] I therefore rule that the plaintiff was not caught by the Limitation Act since time starts to run from 7 November 2008 which the date of the post-dated cheque. In any case, the defendant must have forwarded the same, upon clearance of the same, to AINB Tech, after 7 November 2008.

Balance Of The Purchase Price Paid By The Plaintiff To The AINB Tech Directly

[47] I need to address on the issue of monies paid directly by the plaintiff to either AINB Tech or to its escrow account in Affin Bank. Counsel for the defendant had taken the pain and trouble during cross examination of SP1 to go through all the payments made payable directly to Affin Bank by the

plaintiff. This was indeed confirmed by SP1. The total amount paid directly to Affin Bank by the plaintiff was for the sum of RM1,112.773.78. The details of these direct payments were also amplified in the witness statement of SD2. All the cheques were made in the name of Affin Bank. I am not going into the details of this payment. Suffice to say that I agree with the submission by the counsel for the defendant that the defendant cannot be a stakeholder when monies were not paid to him in the first place.

[48] There is another issue that I have to address. It is this. This is in respect of payments made by the defendant from the deposit account for a total sum of RM121,463.58 to the developer of the said properties; the particulars of which are as follows:

(i) A sum of RM68,783.98 paid to Tropicana Golf & Country Resort Berhad being late payment interest charges and miscellaneous (water, electricity, stamp duty, processing fee) for Unit No. 9 of the said properties.

(ii) A sum of RM32,725.20 paid to Dijaya Management Services Sdn Bhd being payment for miscellaneous (fire insurance, quit rent, services charges deposit, service charges) for Unit No. 9 of the said properties.

(iii) A sum of RM19,954.40 paid to Dijaya Management Services Sdn Bhd being payment for miscellaneous (fire insurance, quit rent, services charges deposit, service charges, sinking fund, interest advice, water charges) for Unit No. 8 of the said properties.

Since the payments were necessary for the purpose of vacant possession of the said units as indicated in s 3.08 of the SPAs it cannot be subject to the stakeholder's account. In any case the release of the monies was vital for the early vacant possession of the said properties. In fact, during cross examination, SP1 admitted that some monies had to be used to pay for outstanding charges so that the keys can be obtained from the developer and early vacant possession can be given to the plaintiff.

[49] The defendant is also not liable for the transaction that took place after its discharge from having conduct of the matter. It is therefore not the duty of the defendant to redeem the said properties from Affin Bank.

The Decision

[50] For the reasons aforesaid, my decision would be as follows:

(a) The defendant do refund the sum of RM528,767.12 to the plaintiff.

(b) Interest at the rate of 5% from the date of this judgment.

(c) Each party to bear its own costs.